U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 May 2006

Case No.: 2005-LHC-1502

OWCP No.: 08-124061

In the Matter of

RAMIRO CARDENAS,
Claimant,

vs.

M & M PROJECT STAFFING,
Employer,

and

GRAY INSURANCE COMPANY,
Carrier.

APPEARANCES:

QUENTIN D. PRICE, ESQ.,
On Behalf of the Claimant

MICHAEL D. MURPHY, ESQ.,
On Behalf of the Employer/Carrier

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by Ramiro Cardenas (Claimant) against M & M Project Staffing (Employer) and Gray Insurance Company (Carrier).[2]

[1] 33 U.S.C. § 901 *et seq*.
[2] For simplicity both Employer and Carrier are collectively referred to herein as Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 02 Dec 05, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of

Claimant

Exhibits

Claimant's Exhibits (CX) 1-12
Employer's Exhibits (EX) 1, 3-10, 13, 16-19[4]
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

STIPULATIONS[5]

1. There is jurisdiction under the Act.

2. The injury occurred on 07 Apr 04 within the course and scope of employment.

3. An employer/employee relationship existed at the time of the injury.

4. Employer was properly notified of Claimant's injury.

5. Medical benefits have been provided.

[3] I have reviewed and considered all testimony and exhibits admitted in to the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

[4] Employer did not offer EX-11 or EX-12 for admission into the record. In addition, EX-2 was withdrawn as the exhibit was blank. EX-14 was also a blank exhibit; however, Ms. Seyler's and Mr. Metreyeon's depositions were subsequently admitted as EX-18 and 19. EX-15 is blank but in actuality is CX-2, the deposition of Dr. Gunderson.

[5] JX-1 Claimant's brief refers to a number of additional facts as stipulated. While it is true that there is no significant issue as to those facts and in fact Employer's brief assumes those facts to be true, they were not stipulated.

ISSUES[6]

1. Nature and extent of injury

    a. Whether Claimant had a post-injury wage earning capacity between 25 Aug 04 through 25 Apr 05.

2. Average weekly wage.

    a. Whether certain amounts termed "per diem" by Employer should be included in the calculation of average weekly wage.

3. Proper and timely Controversion.

4. Attorney's fees and expenses.

FACTUAL BACKGROUND

The basic facts of this case are not in dispute. Claimant primarily speaks Spanish, but understands some English. He injured his back while working as a welder for Employer on 07 Apr 04. He twisted his back while picking up scaffolding and had immediate back pain. He went to the company doctor, Dr. Montet. Dr. Montet prescribed medication and physical therapy, releasing Claimant to return to work at light duty. Claimant returned to work for Employer.

Employer also sent Claimant to Dr. Randall. Dr. Randall prescribed medication and took x-rays. On 24 Aug 04, Dr. Randall released Claimant to return to work, but Claimant did not agree with the release. Claimant's back still hurt and he sought his own choice of physician, Dr. Scott. Claimant received physical therapy and back massages from Dr. Scott until he learned Employer would not pay for the treatment. Claimant found Dr. Gunderson in late 2004. Dr. Gunderson performed an MRI and placed Claimant on light duty work.

Claimant continues to complain of back pain, and now reports that the pain radiates down his leg. Dr. Gunderson scheduled Claimant for surgery on 15 Dec 05 to take a piece of his disc out of his back.[7] Claimant currently takes pentazocine and talwin. To date, Claimant has not reached maximum medical improvement (MMI).

[6] Id.
[7] The surgery was scheduled to take place after the formal hearing.

Sometimes Claimant worked in Employer's local facility and other times he worked offshore. He earned $15.50 per hour without any per diem when working at the shop and earned $11.00 per hour in wages plus a per diem when he worked away from the shop. No taxes were withheld from the per diem.

There is no suggestion that Claimant has ever been able to return to his original job. Claimant received temporary partial disability benefits from 08 Apr 04 through 16 Jun 04 and temporary total disability benefits from 17 Jun 04 through 24 Aug 04. He also receives temporary total disability from 26 Apr 05 and continuing.

POSITIONS OF THE PARTIES

Claimant contends that Employer was unable to establish suitable alternative employment for the period of 24 Aug 04 through 25 Apr 05. Employer paid a per diem when individuals worked offshore or away from the shop. Claimant suggests that the per diem was actually a clothing and tool allowance and should be included as wages in determining Claimant's average weekly wage under subsection 10(c). Claimant also submits that Employer failed to file a timely controversion.

Employer, on the other hand, argues that Claimant had a post-injury wage earning capacity and was partially disabled between 24 Aug 04 through 25 Apr 05. Employer further contends that the "per diem" payments should not be included as wages. Employer maintains that Claimant's average weekly wage should be calculated using subsection 10(a).

LAW

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[8] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial).

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[9] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[10] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

[8] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).
[9] 33 U.S.C. § 902(10).
[10] *Sproull*, 25 BRBS at 110.

The question of extent of disability is an economic as well as a medical concept.[11] To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[12]

Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.[13] Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[14]

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[15] Employers may meet their burden by first introducing evidence of suitable alternate employment at the hearing,[16] even though such evidence may be suspect and found to be not creditable.[17]

The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish the claimant is physically and mentally capable of performing the work and that it is realistically available.[18] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the

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[11] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

[12] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

[13] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

[14] *Id*. at 1042.

[15] *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

[16] *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-37 n.7 (1985)

[17] *Diamond M Drilling Co.*, 577 F.2d at 1007 n.5

[18] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).

medical opinions of record.[19] A showing of only one job opportunity may suffice under appropriate circumstances.[20] Conversely, a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[21] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[22]

Wages

Calculating average weekly wage first requires a determination of what constitutes a wage. Section 902(13) of the Act defines wages as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, *including* the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent benefit, or any other employees dependent entitlement.[23]

The Internal Revenue Code provides that a tool allowance: "is part of a company's wage structure and is, therefore, subject to the taxes imposed by the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and for purposes of the Collection of Income Tax at Source on Wages."[24] The Internal Revenue Code also discusses clothing allowances. When an employer reasonably anticipated amounts for a clothing allowance, the allowance should not be included as wages for the purpose of withholding taxes. However, only the portion of that allowance used on the clothing is excludable.[25] The Ninth and Fifth Circuits have held that the Act defers to the IRS

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[19] *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); s*ee generally, Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).
[20] *P & M Crane Co.*, 930 F.2d at 430.
[21] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[22] *Turner*, 661 F.2d at 1038, *quoting Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).
[23] 33 U.S.C. § 902(13) (*emphasis added*).
[24] Rev. Rul. 65-187; PLR 8249031.
[25] Rev. Rul. 76-548.

definition of wages.[26] The Board, however, has held that the IRS definition of wages is not controlling for every determination of a claimant's compensation rate.[27] The Fifth Circuit's decisions are split on whether per diem or allowances should be included as wages.

The Fourth Circuit concluded that these types of payments are wages if they are earned through actual work.[28] It established a three part test to determine what wages were. Wages are the money rate of compensation that is provided (1) for the employee's services (2) by an employer and (3) under the employment contract in force at the time of injury.[29] "At a minimum, this encompasses cash compensation meeting those conditions."[30] The Act excludes from the definition of wages any benefits whose value is too speculative and cannot be converted into a cash equivalent.[31] Payments that are not part of a claimant's regular pay can still be considered wages if their value can be converted into a cash equivalent.[32] Although in *H.B. Zachry* the Fifth Circuit found that the value of meals and lodging should not be included in the definition of wages, the "Fifth Circuit interpreted *Wright* to mean that if a benefit is paid in dollars and cents and therefore has a value that is apparent on its face, it constitutes a wage rather than a fringe benefit under §2(13)."[33]

Even if the payments are not regular cash compensation, they can still be included as wages if they are for "the reasonable value of any advantage received by the employee that is subject to tax withholdings."[34] This second type of includable wages does not limit the first. The withholding of taxes is not the exclusive test for determining whether a payment should be considered part of a claimant's wages.[35] While an advantage that is subject to tax withholding is a "wage" per § 2(13), the use of the term "including" does not mandate that a benefit not subject to tax withholding is not a wage per se. The term "including" is a term of enlargement, not one of limitation. Advantages subject to tax withholding is only one example of the type of benefits that can be included as a wage. If a payment meets the first clause as being monetary compensation, then the requirement under the second clause is "unavailing." The "tax withholding" clause merely enlarges the definition of wages. When a benefit is not subject to withholding it may still be included as wages if it was part of the agreement under the contract of hire.[36]

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[26] *H.B. Zachry Co. v. Quinones*, 206 F.3d 477, 478 (5th Cir. 2000); *see also Wausau Ins. Co. v. Director, OWCP*, 114 F.3d 120, 121-22 (9th Cir. 1997).
[27] *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).
[28] *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 314 (4th Cir. 1998).
[29] *Wright*, 155 F.3d at 319; *see also Custom Ship Interiors v. Roberts*, 300 F.3d 510, 513 (4th Cir. 2002).
[30] *Wright*, 155 F.3d at 319; *Roberts*, 300 F.3d at 513.
[31] *Wright*, 155 F.3d at 323-25; *Flanagan v. Gallager*, 219 F.3d 426, 432 (5th Cir. 2000).
[32] *Wright,* 155 F.3d at 326.
[33] *H.B. Zachry*, 206 F.3d at 479; *Roberts*, 300 F.3d at 514; *Gallager*, 219 F.3d at 432.
[34] 33 U.S.C. § 902(13); *Roberts*, 300 F.3d at 514; *see also Wright*, 155 F.3d at 319-20.
[35] *Roberts*, 300 F.3d at 515 (the Act does not make tax withholding an absolute prerequisite of wage treatment).
[36] *Story v. Navy Exchange Service Center and Gates McDonald & Co.*, 30 BRBS 225, 228 (Jan 9, 1997).

Per diem payments are not subject to employment taxes if the payments are made subject to an "accountable plan" pursuant to 26 U.S.C. §§ 62(a)(2)(A) and 62(c), as defined by Treas. Reg. § 1.62-2(c).[37] A plan is accountable when "(1) it covers only expenses with a business connection;[38] (2) all expenses are substantiated to the employer;[39] and (3) the employee is required to return to the employer any amount paid in excess of substantiated expenses."[40] The accountable plan must meet all three criteria. If it does not, it will be subject to withholding and employment taxes.[41] Determination of whether there is a business connection is focused on the employer's reasonable expectations, not the employee's actual expenditures. "The rules provide that the amount of a per diem allowance deemed substantiated for each calendar day 'is equal to the lesser of the per diem allowance for such day or the amount computed at the Federal per diem rate for the locality of travel for such day.'"[42]

Under certain circumstances, hourly per diems are explicitly allowed under section 1.62-2, without limitation as to the industry involved. However, the hourly per diem only satisfies the business connection test if it is computed on the same basis commonly used in the industry in which claimant works.[43]

A per diem that is not contingent on expenses may be nothing more than a "disguised wage" that should be included in calculating average weekly wage. While the value of lodging and food should not be included as wages, a per diem should be included as wages where a claimant does not need to spend the per diem on food or lodging.[44]

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[45] which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.[46]

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[37] *Worldwide Labor Support of Mississippi, Inc. v. United States of America*, 312 F.3d 712, 714 (5th Cir. 2002).
[38] *Worldwide*, 312 F.3d at 714; TREAS. REG. § 1.62-2(d).
[39] *Worldwide*, 312 F.3d at 714; TREAS. REG. § 1.62-2(e).
[40] *Worldwide*, 312 F.3d at 714; TREAS. REG. § 1.62-2(c)(3)(i) & 1.62-2(c)(5).
[41] *Worldwide*, 312 F.3d at 714.
[42] *Id.*
[43] *Id.* at 716.
[44] *Custom Ship Interiors*, 300 F.3d at 515.
[45] 33 U.S.C. § 910(a)-(c).
[46] *SGS Control Services*, 86 F.3d at 441; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.[47] Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.[48] But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate.[49]

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

A worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best adequately reflect a claimant's earning capacity at the time of the injury.[50]

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.[51]

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).[52] The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.[53] Section 10(c) is used where a claimant's employment is seasonal, part-time,

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[47] 33 U.S.C. § 910(a).
[48] 33 U.S.C. § 910(b).
[49] *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).
[50] *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).
[51] 33 U.S.C. § 910(c).
[52] *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981).
[53] *See Barber*, 3 BRBS 244.

intermittent, or discontinuous.[54] In calculating annual earning capacity under subsection 10(c), the Administrative Law Judge may consider: the actual earnings of the claimant at the time of injury,[55] the earnings of other employees of the same or similar class of employment,[56] claimant's earning capacity over a period of years prior to the injury,[57] multiply claimant's wage rate by a time variable,[58] all other sources of income,[59] overtime,[60] vacation and holiday pay,[61] probable future earnings of claimant,[62] or any fair and reasonable representation of the claimant's wage-earning capacity.[63]

Under subsection 10(c), the Administrative Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).[64]

EVIDENCE AND ANALYSIS

Testimonial and Medical Evidence

***Claimant testified live at trial that*:[65]**

He is 31 year old and lives in Port Arthur, Texas. He was born in Cotija, Michuacan, Mexico and came to the United States in 1988. He completed the sixth grade and did not take any other educational courses. Although Claimant is a welder, he never attended welding or technical school; he learned to weld at home. He is married and has three minor children. He has also worked as a dishwasher and laborer. Claimant

[54] *Gatlin*, 935 F.2d at 822.
[55] 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).
[56] 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.
[57] *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).
[58] *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.,* 12 BRBS 283, 287 (1980). (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).
[59] *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).
[60] *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).
[61] *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991).
[62] *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).
[63] *See generally, Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).
[64] *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).
[65] Tr. 24-70 (Claimant testified with the assistance of a translator).

understands some English and was able to answer some questions during his deposition without the assistance of the interpreter. Claimant is a resident alien. When he was not working in early 2004, he was in Mexico visiting family. He usually does that when he is not working.[66]

Claimant had injuries prior to his present work-related injury. The handle of a 4-inch grinder came apart and hit him in the face. It no longer causes problems. He also had an incident where he got trash in his eyes. His physical condition before his instant accident was good. He never had a prior lower back injury.[67]

Claimant worked for Employer as a welder on several different occasions. The last time he started working for Employer was about one year prior to his present injury. He was never terminated or fired for misconduct, he would just finish the job he was working on and then get laid off. He received unemployment compensation in 2002, 2003, and 2004. Employer paid him differently depending on whether he worked at headquarters or elsewhere. When he worked in Employer's shop he earned $15.50. Away from the shop he earned $11 per hour in wages and a $4 hourly per diem. Employer's headquarters are located five miles from his home. The dock is located about 20 miles away. When he worked at the dock, Claimant still spent the night at home. When he worked at headquarters, Claimant sometimes brought his lunch from home. Other times Employer fed him. When he worked at the dock, sometimes Claimant brought his lunch, but at times, he also got fed by Employer at the dock.[68]

A welder needs to bring to the job a grinder, whip, leather jacket, gloves, and a welding helmet with glass. Claimant spends about $300.00 per year on welding supplies, including the approximate one year prior to his accident. He used the same tools when he worked at Employer's headquarters as opposed to when he worked at the dock. He did not receive a per diem when he worked at Employer's headquarters. However, most of the time he worked for Employer from June 2003 up until his accident, Claimant received a per diem.[69]

While working for Employer, he also worked on offshore oil platforms. He got to the platforms by either helicopter or boat. He got to the helicopter or boat "in the van" provided by the company. When he worked offshore, he worked a week or two offshore then returned to shore, but it varied; sometimes he worked offshore anywhere from three days up to one to three weeks. He stayed on the rig until the job was completed. He did not have a fixed work schedule. Claimant used his regular tools when he worked offshore. His rate of pay was different when he worked offshore than when he worked at the shop. He earned $11.00 per hour with a $4.00 hourly per diem. There was nowhere to spend his money on the offshore oilrig. There were no vending machines. While

[66] Tr. 25-28, 55-56, 58.
[67] Tr. 28-29.
[68] Tr. 29-32, 58.
[69] Tr. 32-34, 69.

offshore, the platform provided his drinks and did his laundry. He also slept at the platform, but was not charged for the room. He was not charged for his meals, drinks, or clothing either. He also was not required to pay the costs of the helicopter or boat ride to the offshore rig. Working offshore did not cause his tools or clothes to wear out quicker.[70]

When he worked in the shop he was protected from weather conditions. At the shop he stays dry and at the dock he gets wet. The weather does not really affect the condition of his tools, but if he drops a tool it falls into the water and he loses it forever; while if he was in the shop he can simply pick it up. Even so, Claimant has never dropped anything in the water while working. He either works inside something or over grating. All of his equipment lasts the same whether he works in the shop or elsewhere. Claimant also works in welding tanks, which is "nasty work." His clothes do not get ruined, he just washes them. When he works in the welding tanks, Employer washes his clothes before he gets back on the crew boat or helicopter to come back in. He never threw his clothes away after working in a tank.[71]

When he worked away from Employer's headquarters, Claimant received two separate checks. One check reflected his $11.00 hourly rate and taxes were withheld. The other check reflected a $4.00 hourly rate and did not withhold taxes. If the Court determines that the $4.00 hourly per diem should have been included as taxable income, he would pay the government taxes. Claimant did not understand much about taxes, but knew his attorney wanted him to pay more taxes and he was okay with that.[72]

On 07 Apr 04 Claimant worked for Employer on an offshore platform brought into the docks at Cameron, Louisiana. The rig sat in the water while Claimant worked on it. At the time of his injury, Claimant was working on a small platform on the water that was brought close to a big platform tied to the docks. Part of his duties required him to pick up a scaffold. When he picked it up, he looked back to make sure nothing was there that he could trip over. The scaffold slipped and he twisted his back. He had pain in the lower part of his back, but no where else. He reported his injury to his Employer immediately and Employer took him to Dr. Montet. Claimant did not know whether Dr. Montet was a "company doctor." Dr. Montet gave him pain medication. During a follow-up visit, he gave Claimant muscle relaxants and an injection.[73]

Dr. Montet released him to return to work at light duty. Claimant returned to work for Employer. Although his pay records reflected that Claimant earned his full paycheck for the first couple of weeks after his accident, he did not remember it like that. He remembers that Employer put him to light duty at the shop, but then sent him "to the house for two days and they wouldn't pay [him] for those days." With assistance, he

[70] Tr. 34-37, 65-66.
[71] Tr. 62-64, 68-70.
[72] Tr. 37-38, 65.
[73] Tr. 38-42, 60-61.

recalled that on April 23 and 30 he received checks for $1,188.00. If the record reflected that he worked 72 hours for each of those pay weeks, it would be correct. Therefore, Employer paid his full wages for at least two weeks after his accident. Nevertheless, Claimant did not believe that Employer paid him for every hour he worked. Employer then started cutting back on Claimant's hours. Employer did not keep him on light duty and laid him off around June 2004. Claimant could physically work in early 2004, but could not find work.[74]

Claimant treated with Dr. Montet about four or five times. His condition remained the same. Dr. Montet sent him to therapy. Claimant could not recall whether, at the time he was laid off, he still treated with Dr. Montet or whether he started treating with Dr. Randall. Employer chose Dr. Randall. Dr. Randall examined him, gave him medication, and took two x-rays. His condition remained unchanged. Dr. Randall released Claimant to return to work at full duty on 24 Aug 04. Claimant did not agree with Dr. Randall releasing him to return to work because he still hurt. Even though Dr. Randall agreed that Claimant needed surgery, Claimant did not think he was a fair doctor because he kept telling Claimant that nothing was wrong with him. Dr. Randall looked at Claimant's other medical records and concurred with the other physicians. Claimant agrees with the other physicians.[75]

Claimant saw his choice of physician, Dr. Scott, twice for physical therapy and back massages. Dr. Scott then told Claimant that the insurance company would not pay for the treatment, but Claimant did not know why. Claimant found another doctor to treat with in Beaumont, Texas, but the insurance company would not pay him either. He finally started treating with Dr. Gunderson in Lake Charles sometime in late 2004. Dr. Gunderson examined him, took x-rays, and sent him for an MRI.[76]

Dr. Gunderson placed Claimant on light duty. Around April 2005, Claimant began having more back and left leg pain. Between the time that Dr. Randall told Claimant he could return to unrestricted work in August 2004 and April 2005, when Dr. Gunderson told him he was restricted to light duty work, Claimant tried to look for a job. On one occasion, he went to Casa Ole and Luby's for busboy positions. He did not get the job. At that time, Claimant believed he was physically able to handle the work. He did not ask for a written application, he just asked if they would hire him. He never returned or called to see if any positions opened up. They told him if they needed him they would call. Claimant understood that if he really wanted a job he needed to apply in person. Claimant went to the office at Mad Limited to pick up a piece of material, a four-feet long square tubing used for building. It weighed about 10-pounds. Claimant

[74] Tr. 42-44, 58, 66.
[75] Tr. 44-46, 56-57.
[76] Tr. 46-48.

previously worked for Mad Limited and they offered him a job. He told them no because he could only work at light duty and they did not have a light duty position available. The person he spoke with at Mad Limited did not speak Spanish. Other than working for Employer at light duty, he has not been able to find work since his accident.[77]

Claimant reviewed his Functional Capacity Evaluation (FCE) performed in September 2004.[78] It reflected that Claimant could work eight hours a day doing light work. Although the report stated that Claimant showed demonstrated signs of symptom exaggeration and submaximal effort, Claimant believed he gave his full effort.[79]

As of the 02 Dec 05 hearing, Claimant's back was worse. The pain worsens when he has to sit for a while. He also has tingling and pain in his leg and foot. Claimant had an upcoming surgery with Dr. Gunderson scheduled for 15 Dec 05. Dr. Gunderson planned on opening up a square in Claimant's back and taking out a piece of his disc, "but that the pain was not going to go away."[80]

From August 2004 until April 2005, Claimant had continued back pain radiating down his leg. To lessen the pain he had to lie down or change positions. The pain worsened when he picked things up, walked or sat down. He can stand for about two hours without causing back problems, but after two hours, he has to walk, sit, or lie down.[81]

Terry Wayne Metreyeon testified via deposition that:[82]

He is a general partner of Employer's limited liability partner, M&M Industrial Project Staffing, LLC. There are several M&M Industrial entities that he is basically the owner of. He owns all the entities, but is not sure what his titles consist of. He signs the tax returns for employer along with the payroll manager, Michelle McCloud. M&M Industrial Project Staffing supplies M&M Industrial Services with employees. Claimant was on M&M Industrial Project Staffing, LP's, payroll, but was doing work for M&M Industrial Services. The corporate office for M&M Industrial Services is located in Nederland, Texas. The only thing located at the corporate office is Mr. Metreyeon's office. Mr. Metreyeon also has several tenants that rent from him, including a welding supply company.[83]

[77] Tr. 48-50, 52, 57-60.
[78] EX-3.
[79] Tr. 67-68.
[80] Tr. 50-51.
[81] Tr. 51-52.
[82] EX-18.
[83] EX-18, pp. 6-9.

When Claimant "showed up at work" he went to the shop, which is located in Port Arthur, Texas. That is not the same as headquarters, which is located in Nederland, Texas. Workers do not go to the Nederland office for work. The only time the workers go to headquarters is to pick up a paycheck, give information to a supervisor, or fill out paperwork to sign up for work. Everything else is done either at the shop or at another distant location. Claimant sometimes worked at the shop. Other times he worked away from the shop.[84]

Claimant's hourly rate at the shop was higher than when he worked away from the shop. He did not receive the per diem when he worked at the shop. Mr. Metreyeon could not recall the specific offsite locations at which Claimant worked, except that he was on High Island I, located in Cameron, at the time of his work-related injury. While working on High Island I, Claimant drew $46 per day in per diem. The rig did not house or feed the workers. Depending on which way Claimant drove to Cameron, it would be anywhere from 87 to 114 miles. Claimant was responsible for his own room and board, travel, and tools and clothing.[85]

Mr. Metreyeon denied that the per diem was paid at an hourly rate, but admitted that it is prorated by the hour if a worker works more or less hours. Employer will not pay a worker his full per diem when he comes in late or leaves early nor is it fair to a worker who works 13 or 14 hours not to get an increased per diem. Therefore, if a worker does not work the full day or works more than a full day, the per diem is then broken down by the hour. When employees go to Cameron, they get a $36 per day per diem plus an extra $10 because they said they could not make it to Cameron on $36 per day. He denied that the workers were told that they were getting $11 per hour as pay and $3 per hour as per diem. According to Mr. Metreyeon, Claimant earned $12 per hour and a $46 per day per diem. He did not know what that worked out to on an hourly basis. He always wrote it up on a daily basis. Every job is different, therefore, he could only testify as to the per diem at the job where Claimant was injured. Per diem changes based on the difference in the circumstances.[86]

Claimant also received a per diem when he worked the Sabine ship. Mr. Metreyeon did not know how far the Sabine ship was from the shop, but if Claimant testified that it was approximately 20 miles, he would probably be correct. After a certain date, however, Employer stopped paying a per diem for working on the Sabine ship. He could not recall why Employer stopped paying the per diem, just that Employer originally paid the per diem because "everybody else was." Mr. Metreyeon estimated that Claimant likely earned the same per diem for working on the Sabine ship as he did for working on an offshore rig. "He could have been working in mud tanks that would cause him to lose clothing, boots, gloves, personal gear or breaking and wearing out or

[84] Id. at 10-12.
[85] Id. at 12-13.
[86] Id. at 14-16.

dropping tools in the water." The estimate on the cost of tools employees wear out while working offshore was calculated many years ago after Employer stopped providing its employees with all the necessary equipment. Because the workers had no regard for Employer's tools, Employer came up with a number that was actually lower than what it actually spent on replacing tools and gear. Employer stopped replacing the equipment and gear and started giving its employees per diems. The good faith estimate that Employer came up with was based on the number of hours worked. Mr. Metreyeon did the estimate himself, but asked his accountant if what he did was legal and his accountant assured him that it complied with IRS regulations for incidental expenses. He did this sometime in 2001 or 2002, but could not recall exactly when.[87]

If necessary, the per diem also covered meals, mileage, tools, clothing, or any other incidental expenses. Per diem applies to each individual job. Mr. Metreyeon could not be pinned down on each incidental expense as reoccurring because every job creates a different situation. Sometimes Employer pays differently depending on the type of job; however, a lot of jobs are reoccurring.[88]

Mr. Metreyeon defined "working offshore" as working "away from the bank" or working out in the Gulf of Mexico. Even though when employees work offshore their meals and lodging are provided and their clothes are laundered, they can still spend their per diem by losing tools, tearing clothes, and ruining boots or gloves. Employer would need to replace or fix these items and send it to the employee on the job site. All of these things are payroll deducted and sent to the employees by FedEx. Employees pay for the FedEx and whatever they lose, wear out, or break. A welder does not earn any money unless he has a welding hood. If he loses his hood, he just sits out there waiting and does not draw an hourly wage. An employee who loses equipment calls the bank and somebody will either mail or bring the replaced equipment to the heliport or boat dock to send to the employee. The employee incurs the costs and does not earn wages during that time period.[89]

Mr. Metreyeon clarified that when employees work offshore, their room is provided. Meals, incidental snacks, drinks, and laundry are also provided. The only things employees have to purchase themselves are their tools, clothing, and incidentals such as tobacco products and personal hygiene. Mr. Metreyeon did not know whether the per diem covered tobacco products, but stated that it was not included in his good faith cost estimate.[90]

[87] Id. at 16-19.
[88] EX-18, p. 19.
[89] Id. at 20-21.
[90] Id. at 21-22.

Mr. Metreyeon did not know whether Claimant worked for Employer during the time that it paid per diem in Sabine Pass. If Claimant testified that he received a per diem while working at Sabine Pass, Mr. Metreyeon had nothing to contradict his testimony. In addition, he could not testify what the per diem paid for unless he specifically pinned down the job and went back and pulled his records for that job. Mr. Metreyeon knew about his deposition for about three weeks, but did not review his records to find out where Claimant worked or what the justification was for the per diem he received at each job. He could not recall the last time he pulled the records since 2000 or 2001 and estimated an employee's costs for items Employer claimed it paid as a per diem. He might have done it once or twice.[91]

Employer does not have a lot of onshore rig work anymore, not since the High Island I. High Island I was the only onshore rig Employer worked on the year Claimant injured himself. Mr. Metreyeon could not recall how many onshore rigs the company worked on in 2003, but that it was "very few." In addition, Employer has probably not worked on many at all in Sabine Pass. Mr. Metreyeon did not know what the difference in per diem was for working on offshore rigs versus onshore rigs. He could only testify about what Employer paid on the High Island I and that Employer did not pay per diem when the employees worked in the shop. He denied that Employer paid for mileage for workers to drive to the High Island I project and then return that night to their homes. He reiterated that Employer gave the workers $46 per day and it was the workers' choice whether they drove back and forth. Employer did not dictate anything other than what time the workers had to be at work and what time they could leave.[92]

Mr. Metreyeon did a good faith estimate on the cost for the employees and their out-of-pocket expenses on the High Island I project. He calculated the amount the workers would get paid when the job first started. He said that it was probably the second time he did a good faith estimate. He could not recall any other times where he calculated a good faith estimate for per diem. It has been many years since he calculated how much per diem the offshore workers should get, probably around 2000 or 2001. The good faith estimate included lodging, food, tools, and clothing. He could not recall how much he attributed to food. He did not sit down and write out numbers. His estimate was a ballpark guess he made in his head. His attorney advised him that there is a "safe harbor amount" that can be paid without a requirement that the employees' keep receipts to submit periodically. He does not understand what that means, but he was assured that the amount he authorized was well under the safe harbor amount.[93]

[91] Id. at 23-24.
[92] Id. at 24-26.
[93] EX-18, pp. 26-29.

Mr. Metreyeon recalled being deposed in *Rodriguez v. M & M Industrial Services*.[94]

According to his CPA, he should have called the per diem incidental expenses, not a tool and clothing allowance. Incidental expenses cover tools and clothing and anything else that comes into play. Mr. Metreyeon could not state what the anything else would be. In regards to the Cameron job, the good faith estimate included money for tools, clothing, food, mileage, lodging, and whatever else Claimant needed for the job. Mr. Metreyeon did not know the reimbursement rate for mileage. He did not know whether the workers intended to travel back and forth. Sometimes the workers get together and share the cost of renting a motel room. He believed that the mileage reimbursement rate at that time was around $0.30 a mile, but he did not know what the IRS allowed.[95]

The workers use their own 4-inch grinders, welding hoods, aprons, gloves, boots, chipping hammers, and any other protective gear when working at the shop, but Employer does not pay a per diem when they work in the shop. These are the same items they use when they work offshore at Cameron or Sabine Pass. Employer only pays per diem when the workers work offshore because their equipment is exposed to more wear and tear and environmental disturbances. When the workers are in the shop they do not risk losing their equipment or dropping them overboard. A lot of workers lose their tools overboard, but Mr. Metreyeon could not give an educated guess as to how many. He gave an example of possibly two to five chipping hammers per day. The aprons and gloves are also worn out differently offshore than in the shop depending on the chemicals they work with. Most offshore welding is stick rod welding. In the shop a process called flux core welding is used. Flux core welding is not as bad on the gloves as stick rod welding because the workers use a lighter glove to weld and hold the flux core machine gun.[96]

The main shop is located dock side. The workers do not normally work at the dock facility, but they do load the boats. To date, no work has ever been performed on a vessel at Employer's dock. The only thing done was to load stuff the workers built or unload things sent to Employer. Welders would not be involved in loading or unloading. Claimant's wages included time he spent working offshore.[97]

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[94] Mr. Metreyeon's deposition was taken after formal hearing. Counsel for Employer objected to any reference to the *Rodriguez* case as irrelevant. He preserved his objection in his post-hearing brief as well. The objection is sustained as the deposition in the other case contained no significant prior inconsistent statements for the purposes of impeachment. However, had the objection been overruled and the statements considered, it would not have affected the outcome of this case.

[95] EX-18, pp. 29-32.

[96] Id. at 33-34.

[97] Id. at 34-35.

To testify about what expenses were included in the good faith estimate, Mr. Metreyeon needed to determine the specific job and pull the records for that job. He did not pull those records prior to his deposition and did not do those calculations before the per diem amounts for a particular job were set up. Employer used the same rate whether the offshore work was at Sabine Pass or Cameron. Depending on what year was involved, Employer did not always pay a per diem for the Sabine Pass jobs. Mr. Metreyeon did not recall whether Claimant worked in Sabine Pass. Employer does not usually pay per diem to the welders at Sabine Pass. Mr. Metreyeon needed Claimant to tell him what job he specifically worked on at Sabine Pass and Mr. Metreyeon would need to pull the records to determine whether Claimant received a per diem.[98]

Employer generally figures per diem on 12-hour days for $36.00 per day. Employees generally see it as a $3 per hour per diem. If a worker worked 14 hours in one day, he got $42 in per diem. Employees do not get overtime on per diem. Employer continues to pay per diem to its offshore workers. Mr. Metreyeon could not testify whether it paid at the same per diem rate because "[d]ifferent circumstances fall under different deals." Different rates apply for everywhere, specifically offshore work. The difference depends upon the type of job.[99]

In Claimant's case, when he worked offshore for Employer, he would be picked up either at home or the shop and transported to the offshore location. Claimant provided his own transportation the day he was injured. Mr. Metreyeon could not answer whether the per diem was any different when employees drove themselves versus when a common carrier picked them up. Employees are paid travel wages from the time they leave the shop until they get to their destination. Mr. Metreyeon did not think they were paid per diem on the travel wage and did not know what the travel wage was back in 2003 or 2004. He believed it was a reduced rate, but that it was all over the board for different things.[100]

Claimant did not have an arrangement with Employer to provide lodging or meals. Employer paid Claimant a per diem for meals, lodging, travel, and incidental expenses for the Cameron job. Incidental expenses include small tools, gloves, special clothing, hoods, glasses, boots, hard hats, safety glasses, and other protective gear. Mr. Metreyeon contacted his CPA, Mr. Richmond Bennett, to determine whether Employer followed IRS guidelines. Even though Employer pays a per diem for clothing, Mr. Metreyeon was instructed by his CPA that it is considered incidental expenses, not a clothing allowance. In the same respect, even though Employer pays for hoods, gloves, grinders, and chipping hammers, it is also considered incidental expenses, not a tool allowance.[101]

[98] Id. at 35-36.
[99] Id. at 37-39.
[100] EX-18, pp. 40-42.
[101] Id. at 42-44; 48-49.

Mr. Metreyeon had no way of knowing whether the workers spent the night in Cameron or returned home. What they do with their per diem under the safe harbor amounts did not concern Mr. Metreyeon or Employer. "[T]hey can pitch a tent, they can rent a motel, they can drive back and forth 200 miles. As long as [Employer gave] them the per diem and staying within those amounts, they don't have to provide [Employer with] receipts. They don't even have to show the IRS receipts." It is not Mr. Metreyeon's responsibility to determine whether the employees actually spent the night or drove back and forth.[102]

Mr. Metreyeon worked in this industry for over 20 years. He entered the field in 1979 directly out of high school. Since the 1970s, it is industry custom to pay a per diem to workers that are working away from the shop.[103]

Mr. Metreyeon identified the two separate ways to get to the Cameron job - one way is by ferry, the other using the causeway bridge. Sometimes the bridge is shut down or the fog is too heavy for the ferry to run. There is always a chance that the workers may have to go through Lake Charles to get to work. The fog is particularly bad during the spring time.[104]

Claimant was hurt on the High Island rig, which according to the Act's rules, is an offshore facility type situation. However, Mr. Metreyeon refers to it as dock side work. Free room and board and laundry service was not provided during the High Island 1 project. As to the Cameron job, Mr. Metreyeon could not recall how he came up with the per diem amount or the mileage component. Since Cameron was further, he determined that the amount the employees received elsewhere was not enough for them because they also had to feed themselves and possibly obtain lodging.[105]

He discussed the per diem issue with Mr. Bennett several times before Claimant injured himself. He did not recall when, just that Mr. Bennett informed him that he was well within the IRS rules and regulations. Mr. Bennett did not have any involvement in calculating the amount of per diem. Mr. Bennett advised him that there are good faith or safe harbor amounts. Mr. Metreyeon did not know whether Employer had any type of accountable plan under the Internal Revenue Code related to issues of per diem and stated that his CPA might know. Mr. Bennett is the person Mr. Metreyeon relies upon for his tax advice regarding per diem. He has discussed with Mr. Bennett about substantiating the per diem, however, because of Hurricane Katrina, they have not gotten around to doing so. He never discussed substantiating the per diem rates prior to Claimant's work injury.[106]

[102] Id. at 44-45.
[103] Id. at 45-46.
[104] Id. at 46-47.
[105] EX-18, pp. 47-48.
[106] Id. at 50-54.

Mr. Metreyeon did not know whether the workers made money off their per diem. When they worked offshore they received a lower hourly wage plus a per diem. When they worked at the shop they just received an hourly wage, but a higher hourly wage. Employees would still want to work offshore if Employer did not pay per diem because they can work more hours offshore. Occasionally someone in the shop gets to work 7/12. After Claimant's injury, he was able to return to work on a 7/12 job on the High Island I. Nevertheless, Claimant's payroll records reflect that even though he was assigned to that job, he did not work 12 hours or a full work week every week. The shop is primarily a 40-hour per week scenario. At the shop workers tend to earn around $600 per week for 40 hours, but offshore they can earn $1,300 per week working 84 hours or more.[107]

Howard Michael Shupp testified via deposition that:[108]

He is a licensed CPA in Texas and has been a CPA for 21 years. He was fined from the licensing board for filing his renewal late one year, but has not received any other disciplinary action. He also worked for the Internal Revenue Service, in the criminal investigations division from 1972 until 1982.[109] While with the IRS, he worked cases involving suspected tax evasion and false statements on material matters made with criminal intent.[110]

Mr. Shupp reviewed his report[111] dated 22 Nov 05. The report provided responses to specific questions from Counsel for Claimant. Mr. Shupp had the opportunity to sit through Mr. Metreyeon's deposition in Claimant's case and another case. According to the depositions, neither Mr. Metreyeon nor Mr. Bennett attempted to make any kind of good faith estimate to justify the per diem Employer paid to its employees. The 17 Jan 06 deposition was the first time he heard anyone testify that they made those good faith estimates.[112]

The general rule under the Internal Revenue Code is that any payments made by an employer to an employee are presumed wages unless there is an exception to the general rule. Per diem payments are not excludable from wages. To be excluded from income, per diem payments require an accountable plan. It is fair to say that Mr. Bennett did not help Mr. Metreyeon develop an accountable plan and neither knew what an accountable plan was. An accountable plan is "a plan whereby the employee informs the employer of what their expenses were, what their travel was and claims reimbursement for the reimbursable expenses."[113]

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[107] Id. at 54-56.
[108] CX-12 (his expert report was also admitted into the record at CX-10).
[109] CX-11 (a copy of Mr. Shupp's curriculum vitae).
[110] CX-12, pp. 5-7.
[111] CX-10 (a copy of Mr. Shupp's expert report).
[112] CX-12, pp. 7-8.
[113] CX-12, pp. 9-11; CX-10, p. 1.

An employee can be reimbursed for out-of-pocket expenses necessitated by their employment by turning in his receipts to verify his expenses and fill out a voucher for travel expenses, lodging, meals, incidentals, and mileage. Once the employee turns in a report, the employer reimburses based on the information in the report. There can be a flat rate for the travel expenses based on rates published by the IRS. Some companies call them expense vouchers. The mileage rates vary each year. The IRS usually publishes the mileage reimbursement rate once a year, however, in the last two or three years, there have been different rates for parts of the year due to the massive increase in gasoline prices. Legitimate business expenses for an expense voucher include lodging, mileage, meals, and incidentals. Incidental expenses consist of laundry expenses, tips, and transportation from lodging to office or to restaurants if the employee cannot get a meal at the office. Mr. Shupp did not see any indication that Employer's employees provided tips to the workers that were on the offshore rigs. Per Mr. Metreyeon's deposition, he included as incidental costs tools, gloves, clothing, hoods, and safety glasses. The IRS definition of incidentals does not allow employers to reimburse employees for small tools, gloves, special clothing, hoods, or glasses.[114]

The IRS differentiates tax treatment between per diems and wages. Tools, safety equipment, supplies and clothing can be reimbursed without being included in employee's wages. For it not to be included in an employee's wages, a good faith estimate must have been made to determine whether the reimbursement is closely approximate to the employee's actual costs. If a company discovers it is reimbursing at a much higher percentage then the actual expenses of the employees and the IRS determined that there was a good faith negotiation, then a per diem will not be included in an employee's wages. However, once an employer knows the amount is wrong they must include the excess in the employees' wages. The good faith estimate helps insure that the reimbursements commensurate with the estimated actual expenses. Therefore, a clothing allowance can be provided on a tax-free basis.[115]

A good faith estimate requires that an employer do a study to determine what the costs actually are to come up with numbers that approximate an employee's expenses. Mr. Shupp is not aware of any requirements to periodically reanalyze those estimates. Although Mr. Metreyeon testified that he made a ballpark estimate regarding an employee's expenses, a ballpark estimate is not a good faith estimate unless there is some actual analysis and real numbers to base it on. Mr. Metreyeon did not indicate using any actual analysis regarding the per diem. If there is no good faith estimate of actual costs, then the income should be treated as taxable income/wages.[116]

[114] CX-12, pp. 11-14.
[115] CX-12, pp. 14-16; CX-10, p. 1.
[116] CX-12, pp. 17-18.

If an employee travels under 50 miles one-way to work every day, then it is considered nondeductible commuting. The employer can pay for the mileage, but it would be includable as income. If an employee has to travel over 50 miles per day, it is treated as a travel expense because it is considered to be outside of the employee's normal work area. The rule of thumb that the IRS uses is: if it is an indefinite period time (expected to last less than one year) then it is a travel expense. Mr. Shupp was not aware of any legitimate way for an employer to get mileage reimbursement on an hourly basis. For reimbursement, the employee must either report the actual mileage driven or the fact that they made the trip on a given day and provide the Mapquest mileage. One or the other would have to be done for the mileage reimbursement not to be included in wages. Mr. Shupp could not recall the exact IRS mileage reimbursement rate in 2003, however he recalled that it was about 32 ½ cents up to $0.36 per mile. The IRS treats lodging and meals differently depending on whether the employee spends the night away from home. When employees are not away from home overnight, then their meals and incidentals are includable as income.[117]

Mr. Metreyeon testified that he had no idea whether the employees spent the night away from home, yet he included meals and lodging in his per diem calculation anyway. An employee must account to the employer whether they are away from home overnight or not. If there is no accounting, then it is included in income and taxable as regular wages. In addition, Mr. Metreyeon's statement that he had no idea whether employees were making money from the per diem is a clear indication that there was no good faith estimate to determine whether those reimbursements were actually equal to at least approximately the actual expenses being incurred. An employer cannot pay the lodging for an employee who does not spend the night away from home overnight. For an employee who stays away from home overnight, but does not incur a lodging expense, the employer can only pay the meals and incidental expense portions. There is no discretion; it depends on whether the employee is traveling into a high or low rate area. High rates include areas such as San Francisco and New York. Low rate areas include Cameron, Louisiana and Orange, Texas. The published low rate from 2003 forward ranges from $34 and $40 per day.[118]

The second way for an employee to get reimbursed is that the employer pays whatever the IRS has published as the reasonable amount for meals and lodging for the area. As long as the employee is not reimbursed in excess of those amounts, it is considered an accountable plan. If an employee chooses not to go out and eat, the IRS recognizes that as a permissible way of handling the situation and the employee can actually save or make money from the per diem.[119]

[117] Id. at 18-20, 38, 42, 54.
[118] Id. at 20-22, 35-36.
[119] Id. at 22-24.

It is Mr. Shupp's understanding that Claimant's meals, lodging, and laundry service were provided by his Employer. Expenses for small tools, gloves, special clothing, hoods, and glasses are reimbursable only under an allowance arrangement for tools, clothing, safety gear, and equipment. There is a difference between a per diem and a clothing and tool allowance. Per diem covers travel expenses for lodging, meals, and incidentals. Incidental expenses do not include safety equipment, tools, or safety clothing. In regards to the tools and clothing allowance, there has to be the good faith estimate of the actual out-of-pocket expenses incurred before those payments can be made to employee as a tax free exchange.[120]

Mr. Shupp opined that what was listed as per diem payments should have been included as taxable income instead because they did not meet the requirements of an accountable plan and there was no good faith estimate to approximate the actual expenses incurred by Claimant. In addition, when Claimant works offshore, he has no out-of-pocket expenses for meals, lodging, or laundry. The site where Claimant injured himself was not a locale which provided free laundry service or free room or board. A worker can legally accept free room and board, but if he is being reimbursed for meals, then the reimbursement would be includable in income. Up until Mr. Metreyeon's deposition, it was Mr. Shupp's understanding that Employer paid the per diem on an hourly basis. It was not until Mr. Metreyeon's 17 Jan 06 deposition that Mr. Shupp first heard about a "daily per diem." If it is a daily per diem, it should not go up or down based on the number of hours an employee works. Mr. Metreyeon's statements are inconsistent. Per diem is either paid by the hour or by the day, but not both. It is also inconsistent for an employee to receive a clothing or tool allowance only when away from the shop, but not when working at the shop. A welder should need the same equipment and wear them out the same regardless of where he worked. Even if there is a different rate of wearing out clothes and tools offshore versus in the shop, then the employer needs to calculate a good faith estimate of what those differences were in order to meet the requirements of the IRS. Mr. Shupp could not understand why there was a lower rate of pay for the shop versus offshore.[121]

Mr. Shupp does a lot of tax returns for employees in the plants and offshore, but would not admit that he is "really familiar" with them.[122]

Mr. Shupp based his report[123] on the depositions of Mr. Metreyeon and Mr. Bennett, a CPA. Those depositions were not in connection with Claimant's case. They were in connection with a different longshore case. Mr. Shupp did not meet with Claimant, but Mr. Shupp assumed it was true that Claimant received two paychecks per week – one represented wages and the other represented the "per diem." This means

[120] CX-12, pp. 24-25.
[121] CX-12, pp. 25-29, 43; CX-10, p. 1.
[122] CX-12, p. 29.
[123] CX-10 (it is noted that Mr. Shupp based part of his decision on evidence not admitted, however, experts are allowed to base their opinions on evidence that is not part of the record. Nevertheless, the testimony regarding the other case did not affect the outcome of Claimant's case).

Employer is keeping its accounting separately, which is proper. They could be lumped together. In fact, he includes per diem in payroll checks all the time. It should, however, be included as a separate entry. Mr. Shupp believes the relevant per diem is a taxable advantage to Claimant.[124]

Mr. Shupp agreed that an employee can save or make money on a fixed per diem that has nothing to do with taxable income. Just because an employee makes money on a per diem does not mean he has to report the excess as wages. Mr. Shupp did not fault Mr. Metreyeon for not vigilantly investigating whether employees made money on a per diem. When Mr. Metreyeon referred to a safe harbor amount, he was trying to refer to the meals and incidental expense portion of the published rates the IRS puts out each year. It covers geographic areas and has a high and low rate. On an accountable plan reimbursement, if an employer does not reimburse in excess of those amounts for lodging, meals, and incidentals, then it is considered to not be income to the employee and everybody is safe. The safe harbor amount includes meals, incidental expenses, and lodging.[125]

Nothing in evidence disputes Mr. Metreyeon's testimony that he consulted with a licensed Texas CPA to confirm whether he acted legally. Mr. Shupp is aware that Mr. Bennett is a licensed CPA in Texas. Tools are not included within incidental expenses under the IRS regulations. They would be included under a tool allowance. An accountable plan requires that there be a good faith estimate on the part of the employer to determine that the reimbursements are commensurate with the actual expenses incurred by the employee. Good faith estimate is a broad term and does not have to be perfect. Mr. Shupp had no evidence to dispute that Employer's costs involved "hundreds of thousands of dollars."[126]

If an employer pays an employee for costs of wearing out tools, gloves, and clothing, it is not a per diem. It is a reimbursement or an allowance, but not a per diem. An allowance can be based upon a good faith estimate which does not need to be repeated every calendar year. There is no set requirement; you just have to show that a good faith estimate was performed in case of an audit.[127]

At no time, throughout the last nine months, has Mr. Shupp seen any kind of documentation that would indicate that Mr. Metreyeon performed an analysis of the actual cost to the employees. An employer can pay whatever he wants to, it is just that the per diem where Claimant worked offshore should be includable as wages and taxable.[128]

[124] CX-12, pp. 30-33.
[125] Id. at 33-35.
[126] Id. at 38-42.
[127] CX-12, pp. 42-45.
[128] Id. at 45-47, 52.

For a person to make money off of a per diem and not trigger any problems with the IRS requires the person to skip meals and still receive per diem. There are two alternatives in per diem – either provide the expense reports or pay the IRS approved rates for per diem. Mr. Metreyeon's testimony regarding his calculation of per diem and his good faith estimate of those costs was like mixing apples and oranges because he included food and lodging and travel with tools and clothing and that is actually mixing a per diem with an allowance. If he is included everything, there is no way that Mr. Metreyeon's good faith estimates could even be close to correct. Mileage reimbursements must be accounted (actually calculated) for and there is no good faith component for it to be tax free.[129]

As a CPA, had Mr. Shupp met with Mr. Metreyeon, he would have told him not to call the money a per diem, but to call it a tool, safety clothing and equipment allowance. He would also tell him to split up the mileage from the allowance. If an employer knows a jobsite is 80 miles away and the employer gets wage records showing the employee is showing up, then it is permissible for the employer to include the mileage reimbursement to the jobsite as an allowance. For it not to be included as wages, mileage must be reimbursed under an accountable plan. If there is a carpool, the driver gets reimbursed. The driver would not have to establish the exact mileage. If it was one hundred miles on Mapquest, then he can be reimbursed for one hundred miles.[130]

In Mr. Shupp's experience, every company sets up procedures for practice that they follow from one jobsite to the next. Until they are told they cannot continue their practice, they continue the same practice from one job site to the next.[131]

Medical Evidence

***Dr. Clark A. Gunderson testified via deposition that*:**[132]

He first examined Claimant on 17 Sep 04. Claimant presented with lower back pain caused by an on-the-job injury. The incident Claimant described was consistent with the complaints he made. Dr. Gunderson examined Claimant with the help of an interpreter. There was tenderness at L5 on both sides and the straight leg raising caused back pain at 70° on both sides. Claimant's posture and gait were normal and there were no lumbar spasms. Claimant also had full range of motion in his lumbar spine. He reviewed the MRI, which reflected a disc herniation. It was Dr. Gunderson's impression that Claimant's back pain was probably due to an abnormal disc in his back.[133]

[129] Id. at 47-49.
[130] Id. at 49-52.
[131] CX-12, pp. 53-54.
[132] CX-2 (Dr. Gunderson testified that he answered all questions based on reasonable medical probability. His narratives to carrier are also admitted into the record at CX-8 and EX-7).
[133] CX-2, pp. 5-7; CX-8, p. 1; EX-7, p. 3.

Dr. Gunderson did not feel Claimant's back was disabling or that Claimant was a candidate for surgery. Dr. Gunderson released Claimant to return to work at modified duty as reflected in the functional capacity evaluation (FCE). When he first examined Claimant in 2004, Dr. Gunderson did not think Claimant could return to welding work. Based on reasonable medical probability, Claimant's on-the-job injury likely caused his lower back problems. At that point, Dr. Gunderson did not have a recommended treatment plan.[134]

He next examined Claimant on 26 Apr 05, almost six months after his initial examination. Claimant complained of back pain radiating down his left leg, with numbness and tingling all the way to his left foot. Claimant's leg pain was worse during this visit, but he still walked normally. There was tenderness at L4-5 and the straight leg raising was positive at 50°. During this examination, Dr. Gunderson recommended Claimant undergo a repeat MRI of the lumbar spine. The MRI was performed on 02 Sep 05, revealing an extruded fragment of disc material at L4-5. He also continued to have positive straight leg raising and limping on his left side. Up until April 2005 Claimant could have worked full-time within the FCE's restrictions.[135]

Dr. Gunderson was aware that Claimant had an appointment pending with Dr. Randall for a second opinion, but did not know that Dr. Randall agreed with his recommendation for a follow-up MRI. [136]

When a patient comes in for treatment and says he hurts, Dr. Gunderson basically gives him the benefit of the doubt. He also looks to see whether there is a correlation between the symptoms individuals' complain of, the MRI studies, and their reaction to the physical examination. Claimant's reactions were consistent with what Dr. Gunderson observed on the MRI films.[137]

Dr. Gunderson compared the films from the 21 Sep 05 MRI with the 21 Jun 04 MRI. He agreed with the radiologists' reports. The 2004 MRI revealed left pericentral herniation and mild pressure upon the dural tube. The 2005 MRI revealed a 5 by 2 millimeter, left pericentral disc extrusion with associated small annular tear at L4-5. He advised Claimant that since he had been symptomatic for over one year he should have a micro lumbar laminectomy at L4-5 left. Claimant became a surgical candidate because of the natural progression of the radiographic findings and the progression of the symptoms and neurological deficits. Dr. Gunderson believed that Claimant had a weakened area and he continued to have inside-out pressure of the disc material until it finally extruded some of the disc material, irritating the nerve going down his left leg. Claimant's current complaints are just a natural progression of the original injury. Claimant had a herniation present before, but now it is greater. Claimant was not

[134] CX-2, pp. 7-9; CX-8, p. 2; EX-7, p. 2.
[135] CX-2, pp. 8-9, 15; CX-8, p. 1; EX-7, p. 1.
[136] CX-2, p. 15.
[137] Id. at 24-26.

working the last time he saw Dr. Gunderson, in May 2005 and Dr. Gunderson did not send him back to work. Dr. Gunderson continued Claimant's restrictions. Claimant takes Talwin, a prescribed non-narcotic pain medication. It was first prescribed on 11 Jul 05. Dr. Gunderson did not know whether the medication prevented Claimant from operating machinery. He intends to prescribe Talwin to Claimant on an ongoing basis.[138]

Dr. Gunderson has had the same basic restrictions in place for Claimant since he first examined him, even though Claimant's condition progressively worsened. At first, Claimant's condition did not change, then it began to worsen and since Claimant was not working, Dr. Gunderson did not believe he had to address Claimant's work abilities and did not discuss with Claimant any attempts at obtaining work. He did not think about possible part-time work either. Somewhere down the line Claimant could not work anymore. Up until April 2005, Claimant could handle modified work. His condition worsened after April 2005 and he could no longer return to work[139]

Dr. Gunderson communicated with Claimant with the help of another Hispanic man that Claimant usually brings to translate their conversations. Up until 26 Apr 05, Claimant could have handled the physical requirements of busboy work, however, as of the hearing, Claimant could not. Claimant has pressure on the descending nerve root at L5. L5 is the extensor hallucis longus (the extensor tendon to the big toe). There is no reflex for the L5 nerve root – the S1 nerve root goes to the ankle reflex and the L4 goes to the knee reflex. Therefore, no EMG test was performed.[140]

After 26 April 05, Claimant could not return to work.[141]

Dr. David Randall's medical records reveal in pertinent part:[142]

Dr. Randall, an orthopedist, released Claimant to return to work on 09 Jun 04 with a restriction of no lifting greater than 10 pounds.[143] Although Claimant complained of consistent pain since his 07 Apr 04 injury, he has not really had any medical treatment. Claimant saw a physician, but the physician did not prescribe anti-inflammatories or physical therapy. Claimant denied numbness or tingling in his legs. Physical examination revealed normal gain and discomfort with passive range of motion of his right hip. X-rays revealed loss of lumbar lordosis, but well-preserved disc heights. He diagnosed Claimant with acute lumbar strain, prescribed Naprosyn and Flexiril, and

[138] CX-2, pp. 10-12, 16, 20-21, 23-25; EX-7, p. 7.
[139] CX-2, pp. 16-18, 24.
[140] Id. at 18-19, 22.
[141] Id. at 23-24.
[142] CX-6; EX-8.
[143] Although Dr. Randall states in his 10 Jun 04 report that Claimant was released to return to work with a 10 pound lifting limit, in his 17 Aug 04 report he states he released Claimant from his care with restrictions of lifting no more than 25 pounds.

recommended physical therapy three times per week for two weeks to do trunk stabilization and modalities. Claimant returned for a follow-up on 23 Jun 04 with continued complaints of back pain, but no complaints of pain in his legs. Dr. Randall suggested a lifting restriction of no more than 25 pounds.[144]

Claimant returned for a follow-up independent medical examinations on 17 Aug 04. Even though Claimant complained of disabling back pain, the MRI showed Claimant's condition to be non-surgical. His pain was primarily localized in his lumbasacral region, but his left leg also became numb and caused him to have difficulty standing. Claimant suffered from persistent lumbarsacral dysfunction. Dr. Randall ordered a repeat MRI and opined that further treatment depended on the MRI findings. Claimant also completed a work conditioning program.[145]

Dr. Randall issued a final report on 25 Aug 04. Claimant continued to complain of lower back pain, specifically when he leaned to the left. His gait remained normal. Dr. Randall opined that Claimant suffered from a resolved lumbar strain and had reached MMI. Claimant exhausted all conservative treatment options and was not a candidate for surgical intervention. He released Claimant to return to his regular job. He also gave Claimant a 0% impairment rating.[146]

Claimant returned on 09 Sep 04 with complaints of increased pain in his lower back radiating down to his left leg.[147] Physical therapy did not help Claimant. Whenever he walked or lifted anything his pain in his lumbosacral region increased. Examination revealed negative straight leg raises, normal reflexes, and full lumbar extension. Dr. Randall diagnosed Claimant with mechanical back pain without signs of radiculopathy. He sent Claimant for an FCE and opined that Claimant did not appear to have a surgical lesion.[148]

Claimant returned on 08 Oct 04 after completing the FCE. He continued to complain of severe pain in his back. The FCE showed borderline invalid results secondary to poor demonstrated effort. Nevertheless, Dr. Randall opined that Claimant was only capable of doing light duty work. He treated Claimant with anti-inflammatories, muscle relaxants, and subsequent work conditioning. Dr. Randall tried to release Claimant to return to work, but Claimant maintains that has never been able to return to work. In the absence of objective findings, Dr. Randall treated Claimant with all he knew to rehabilitate his back. Claimant failed to demonstrate a legitimate FCE and Dr. Randall had nothing more to offer Claimant. He encouraged Claimant to seek a second opinion and advised Claimant to return for treatment as needed.[149]

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[144] CX-6, pp. 5-7; EX-8, pp. 1-5.
[145] CX-6, pp. 3-4.
[146] CX-6, p. 2; EX-8, p. 6.
[147] Even though Dr. Randall's handwritten notes state that Claimant had increased pain in his lower back with pain radiating down to his left leg, the typed notes state that he does not mention pain radiating down his legs.
[148] EX-8, p. 8.
[149] Id. at 9

Another follow-up independent medical examination took place on 17 Aug 05. Claimant continued to complain of disabling back pain. He went to the emergency room in June 2005 and received a shot and some narcotic pain medication. Claimant localized his pain to the lumbarsacral region, but also stated that his entire left leg becomes numb and he was unable to stand when he went to the hospital. Dr. Randall diagnosed Claimant with persistent lumbarsacral dysfunction and ordered a repeat MRI of the lumbar spine.[150]

Claimant returned for a follow-up on 26 Oct 05, after his repeat MRI. He had continued complaints of pain in his back radiating into his left leg. Examination revealed decreased Achilles reflex to the left and mildly positive straight leg raise also on the left. Claimant had decreased dorsiflexion and plantar flexion of his foot on the left as compared to the right. The MRI revealed a left L4-L5 herniated disc. Claimant exhausted conservative treatment, including epidural steroid injections. Dr. Randall issued a return to work form, returning Claimant to work with a restriction of sedentary work only. He also gave Claimant a follow-up appointment for 10 Nov 05 and suggested that Claimant get evaluated for a discectomy.[151]

Gulf Coast Open MRI Unit's medical records reveal in pertinent part:[152]

Claimant underwent an initial MRI of the lumbar spine on 21 Jun 04[153] and a subsequent one on 02 Sep 05.[154] The 21 Jun 04 MRI revealed degenerative disc disease at L4-5. There was also a Grade II over V central and left paracentral herniation at L4-5 and mild pressure upon the dural tube. Claimant's bone marrow signal intensity was normal.[155]

The 02 Sep 05 MRI revealed normal lumbar curvature and alignment. In addition, his lumbar vertebral bodies and lumbar intervetebral discs were of normal height and signal intensity. Decreased signal was noted at L3-4 and L4-5, consistent with mild lumbar disc degeneration. A small 5 x 2 mm left pericentral disc extrusion was noted with an associated small annular tear at L4-5. The radiologist also noted mild disc degeneration at L3-4 and L4-5.[156]

[150] Id. at 10.
[151] CX-6, p. 1; EX-8, p. 12.
[152] CX-7; EX-4.
[153] CX-7, p. 1.
[154] Id. at 2.
[155] Id. at 1-2.
[156] Id. at 1.

Montet's Occupational Medicine Services' medical records reveal in pertinent part:[157]

On 07 May 04, Claimant was examined for a follow-up due to mild L5-S1 pain with no radiation. No restrictions were placed on Claimant and he was released to return to his regular duties that same day. Claimant came in for another follow-up regarding his back pain on 27 May 04. Claimant related the back pain to his 07 Apr 04 injury and informed the doctor he was "not satisfied." He continued to have centralized L4-5, S1 pain. Claimant was diagnosed with persistent lumbar pain of uncertain cause. An MRI was recommended due to his complaints of pain. Claimant was again returned to regular duty work on 27 May 04.[158]

Claimant returned for a follow-up examination on 15 Jun 04. He continued to complain about his back pain and that it was starting to hurt more. He was at a 5/10 pain level. No work restrictions were placed upon Claimant and he was once more returned to regular work duty. An MRI was needed to rule out any possible disc problems. On 22 Jun 04, however, Claimant was returned to work with restrictions to limit his lifting to no more than 15-20 pounds and no twisting, crouching or stooping. The MRI was reviewed and Claimant was diagnosed with a herniated L4-5 disc II/V grade. Claimant was told to restrict work until he saw a specialist. He was referred to Dr. Randall. Claimant returned for a follow-up on 23 Jun 04 and was returned to work with the 22 Jun 04 restrictions. He was also prescribed physical therapy three times weekly.[159]

Another follow-up examination was conducted on 27 Aug 04. Claimant continued to complain of back pain. He also complained of pain radiating down both legs, especially his left. He informed the doctor that he could not work. Claimant was referred to a neurosurgeon. Claimant did not return until 26 Apr 05. During this visit, he complained of lower back, thoracic spine, left leg and left foot pain. The pain was moderate and constant. Driving and sitting for long periods caused his pain to increase, while lying down caused it to decrease. Claimant was taken off of work status and told to take Tylenol for the pain.[160]

Claimant had continued lower back pain radiating into his left leg down into his left foot on 31 May 05. His pain was moderate to severe in the upper spine, lower back, left leg, and left foot. In addition to lying down, changing positions also helped relieve some of the pain. Claimant remained off work. Tylenol was no longer helping Claimant and Claimant could not get a second MRI approved.[161]

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[157] EX-6.
[158] Id. at 1-4.
[159] Id. at 5-10.
[160] Id. at 11-12.
[161] Id. at 13.

Claimant returned for a follow-up on 21 Sep 05 and complained of lower back pain radiating down his left leg. The pain in his lower back and left leg was moderate and constant. Claimant remained on no duty work status and was given Talwin in addition to the Tylenol.[162]

Dr. James A. Waugh's medical report stated in pertinent part:[163]

He performed a Functional Capacity Evaluation on 16 Sep 04. He took a detailed narrative and diagnosed Claimant with mechanical back pain. Claimant's symptoms included lower back pain with prolonged sitting, standing, and walking. He also has occasional tingling in the left posterior leg from his knee to his foot. Claimant is able to work at light duty for an eight-hour day. He has a driver's license and can drive in a car for 2 hours before needing rest. Claimant appeared with good posture, but exhibited an unidentified limp. Examination revealed normal ranges of motion. His leg lift and torso lift capacity was 25 pounds. Claimant reported a pain level of 9/10 while performing material handing activities, however he only passed 3/7 (43%) validity criteria, which suggests very poor effort and invalid results which should not be used for medical and vocational decisions. Claimant did show good fine motor skills and that he is qualified for assembly tasks of pieces in the 1-4 mm range or larger. He received a low speed assembly classification. His frequent material handling test reflected 71% validity criteria, suggesting fair effort and valid results.[164]

Claimant is able to sit frequently (34-66%) throughout an eight-hour work day, while he can only stand occasionally (1-33%). Regardless, his validity criteria was only 2/4 which represents poor effort. He performed a modified Naughton treadmill test and demonstrated the cardiovascular ability to support medium physical demand legal work. He also used good body mechanics techniques during his evaluation both by direct observation and distraction. Claimant's movement patterns did not change during the evaluation, reflecting valid Repetitive Movement Tests. Claimant's strength percentile classification is 19%, which reflects an overall strength profile of poor. His occasional material handling was well below average at 21%, while his frequent material handing was very poor at 2%. His hand and pinch grip were also below average.[165]

He is able to perform simple grasping, fine work, and low speed assembly with both his right and left hand. Dr. Waugh classified Claimant as a light duty worker. Claimant qualified for full-time (8 hours) work status. He can occasionally lift 20 pounds and frequently lift 10 pounds.[166]

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[162] EX-6, p. 14.
[163] CX-5; EX-3.
[164] CX-5, pp. 1, 3, 6-10, 12-15.
[165] Id. at 3, 11, 17-19.
[166] Id. at 3.

Claimant demonstrated signs of symptom exaggeration and submaximal effort. He passed with only 21/32 (66%) validity criteria during the FCE, which suggests poor effort and borderline invalid FCE results. Therefore, the physical abilities demonstrated during the FCE "should be considered his minimal physical abilities and his true physical capabilities can only be left up conjection [sic]."[167]

Vocational Evidence

Carla D. Seyler testified via deposition that:[168]

She has been a vocational rehabilitation counselor for 27 years. She is currently on the Texas registry of private providers of vocational rehabilitation services. That means she is recognized by Texas as being able to work Workers' Compensation and longshore cases. She has also been certified on two separate occasions by the Department of Labor, OWCP. The certifications were back in 1980 or 1990. She held the certification for several years. She is qualified, but not on the current certification list. Her practice consists of different types of referrals for vocational rehabilitation services in conjunction with various state and federal laws. She has been accepted as an expert witness in connection with longshore claims on multiple occasions.[169]

She attempted to meet with Claimant, but was not allowed to. Since she did not meet with him personally, she does not know how much Claimant needed to actually sit while working. She believes it is preferable to see someone in person for an evaluation. She would have taken into consideration anything that Claimant told her. She contacted Claimant's attorney who never responded to her calls or letters. She reviewed Claimant's deposition and the trial transcript prior to her testimony. She also reviewed Dr. Gunderson's deposition. In forming an opinion, she considered all of the restrictions Dr. Gunderson placed upon Claimant. It is her understanding that Dr. Gunderson believed Claimant could have worked from the time he saw him (and possibly from the date of injury, April 2004) until sometime after April 2005 or even possibly until September 2005. Dr. Gunderson released Claimant to return to work within the physical requirements demonstrated on the September 2004 Functional Capacity Evaluation (FCE). The FCE reflected that Claimant could work light duty. Light duty work reflected Claimant's ability to lift up to 25 lbs. Depending on the level, Claimant could lift up to 35 pounds in some positions, push and pull up to 70 pounds, and carry up to 30 pounds.[170]

[167] Id. at 1.
[168] EX-19 (the labor market survey was also admitted into the record at EX-16).
[169] EX-19, pp. 10-14, 52-53.
[170] Id. at 6-9, 32-33.

Ms. Seyler prepared the labor market survey prior to the formal hearing, however, upon review of the trial transcript her opinion has not changed. The jobs she identified in the labor market survey[171] basically fell within the light physical demand category. Two of the jobs required an individual to potentially lift up to 25 pounds which makes the job fall slightly into the medium category. Regardless, the jobs are "definitely within" Claimant's physical restrictions demonstrated by the FCE. The FCE reflects that Claimant can lift in some positions up to 35 pounds, in others up to 25 pounds. Otherwise, Claimant is limited to lifting no more than 20 pounds above his shoulder. All the jobs listed in the labor market survey fall within Claimant's physical restrictions. The labor market survey represents available jobs that Claimant could have applied for, competed for, and realistically secured. The jobs were a representative sample of the jobs Claimant could have obtained and successfully worked in.[172]

Before preparing the labor market survey, Ms. Seyler assumed that Claimant could not speak any English, only Spanish. She later learned that Claimant understood some English. She also recognized that he did not have skills and could only perform entry level, unskilled, or very low semi-skilled work. Claimant's past work as a welder can be considered a semi-skilled or a higher semi-skilled level with a Specific Vocational Preparation (SVP) of 5. SVP 5 represents a person who has developed or learned skills. All the jobs she considered for the labor market survey were entry level positions that would not require Claimant to have any type of baseline skill level. Claimant would only have to get to work on time and follow directions. Each of the employers she listed in the labor market survey will consider an individual who only speaks Spanish. Those employers typically had other Spanish speaking employees or spoke Spanish themselves. The employers were comfortable that they could demonstrate the job with no need for verbal explanations. Ms. Seyler believes that the jobs she identified in the labor market survey were merely a representative of a much wider number of jobs available in Claimant's geographical area.[173]

Ms. Seyler was aware that Claimant testified he contacted two employers regarding potential employment, but stated that it appeared from the record that Claimant merely called the employers. She did not know whether he actually went to the place of employment, however, Claimant did contact at least three employers. There is no evidence that Claimant contacted anyone more than once. Ms. Seyler does not consider this "real effort to obtain employment." In her opinion, not only did Claimant have to contact many more employers, he also needed to follow up with those employers. Claimant just called employers asking about openings. That is not sufficient to obtain employment. He needed to go to the potential employer's place of business, complete an application, and follow-up with the employer at a later date. Following-up with a potential employer is important because employers tend to hire someone they recall

[171] EX-16.
[172] EX-19, pp. 14-16.
[173] Id. at 16-18.

meeting with. Each of the employers she listed in the labor market survey required an individual to apply in person. They hire from a pool of applicants that they have on hand. Therefore, if Claimant just made a phone call, it was not sufficient.[174]

Even though Claimant was under doctor's care, Dr. Gunderson released him to return to work with restrictions. Claimant needed to return to work to understand what the job tasks consisted of. He needed to actually physically go to the employer and find out the job duties. Regardless, Claimant testified he felt he could handle the physical demands of being a busboy.[175]

"Willing to consider" Spanish speakers means the employers feel it is perfectly acceptable to have an employee who only speaks Spanish. In fact, many of these employers had individuals similar to Claimant, who only spoke Spanish. She clarified the differences in the labor market survey – "Will consider a Spanish-speaking" versus "Spanish-speaking individuals with limited to no English speaking skills" – as depending on what the employer reported. The language was based on the actual quotes the people she dealt with gave her. Regardless, the employers were "absolutely willing" to have an individual work at their shop who does not speak English.[176]

The jobs identified in the labor market survey are representative of jobs available in the community that Claimant could obtain. After speaking with the employers, it is apparent that Claimant would have no difficulty performing the type of work she identified (i.e. busboy). Although she identified specific available jobs, those jobs were merely a representative of a much wider pool of employers that are available. While Ms. Seyler contacted the employers directly before preparing Claimant's labor market survey, she does not believe it is necessary because she can offer an opinion regarding the labor market survey as a whole due to her experience and knowledge of the labor market. She can offer a general opinion as well as a specific one.[177]

Part of the reason she called the potential employers was to determine whether they required that their employees carry over 50 pounds. Had she contacted five employers and three or four of those employers had jobs Claimant could perform, an inference can be made that those jobs were representative of the labor market as a whole with that percentage of jobs within Claimant's restrictions. She cannot know for sure, however, until she speaks directly with the employer.[178]

[174] Id. at 19-21.
[175] Id. at 21-22.
[176] Id. at 22-23, 57.
[177] EX-19, pp. 23-25.
[178] Id. at 25-26.

While working DOL referrals, Ms. Seyler had a "pretty high" percentage of success in obtaining employment. By "pretty high" she said it could be less than 25% or more than 50%. She said it depends upon motivation. She merely threw out a ballpark figure, but could not recall her percentage of placement. It would not shock her if everyone else who worked for the DOL had a placement rate of less than 10% because there are so many different ways to look at it, such as what kind of criteria they looked for. She did get an evaluation regarding her placement rate while working for the DOL, but she could not recall the rate. She has no idea if her placement rate was 100%, 50%, or 25%.[179]

In her current position, about 50% of her time involves litigation. The other 50% involves a variety of cases referred by Workers' Compensation carriers, employers, and longshore harbor workers cases referred by the employers. Whenever a case is referred by either a Workers' Compensation carrier, an employer, or in litigation, it takes up 100% of her time. Of the 50% of her time involving litigation, 15% is for plaintiffs, 85% is for the employer or insurance carrier.[180]

At the time she contacted the Salvation Army they were closed due to damage from Hurricane Rita, however, if Claimant worked there he could alternate between sitting, standing, and walking throughout the day. It is her understanding that this job is available as full-time work. That employer was accepting applications and asked that potential employees apply in person. There was a lot of employee turnover between April 2004 and September 2005 and more than one individual was hired to fill the position. The job requires the employee to sort through donated clothing items in a warehouse environment and separate good items from damaged/non-sellable items. Claimant's ability to sit on this particular job depends on how he wanted to handle the job. He would have the opportunity to shift his position, but it is not a position where the employer would rigidly require him to sit or stand for a specific amount of time. The job requires dependability and an attention to detail. Although the labor market survey states, "able to sit at times while sorting clothes," Claimant could sit when he wished. He probably would not be able to sit for the entire eight-hour shift, but at most times he could probably sit. The same would go for walking and standing. This job is about 15 ½ miles from Claimant's home and pays $5.15 per hour.[181]

She also contacted Munro's Cleaners. Between April 2004 and September 2005, it hired someone every one to two months for the presser position. Workers are trained to operate a pressing machine to press garments for customers. After garments are pressed they are placed on hangers, then placed onto clothes lines. Although experience is preferred, it is not required. Here, Claimant would have to stand for most of the day. He could sit while at lunch or on a break. He may also be required to lift 25 pounds

[179] Id. at 26-30.
[180] Id. at 30-32.
[181] EX-19, pp. 32-34, 51; EX-16, p. 1.

occasionally, bend occasionally, and frequently reach to handle garments and operate the presser machine. This job is also available full-time and pays between $5.15 and $6 per hour. Employer asks that individuals apply in person.[182]

Generally, employers offer 15 minute breaks. She did not specifically ask what kind of breaks employees got or at what time the breaks occurred. She believes the employers are very willing to accommodate individuals like Claimant. She does not believe the employers would prevent Claimant from taking breaks in the afternoon if he took two breaks in the morning. Claimant would have a 15-minute break in the morning, 30 to 45 minutes for lunch, and another 15-minute break in the afternoon. She believes the individuals are paid for eight-hour days, but she is not sure if that includes time taken for lunch. Her understanding is that lunch is part of the eight-hour day and employees are paid for one hour of break time, however, she did not know if the employers would require that Claimant worked a longer day. He would spend a minimum of seven hours standing or walking at Munro's Cleaners. She does not believe that he would be expected to stand the entire time. Just like any employer, Munro's Cleaners would allow him to sit periodically, if he needed to. The labor market survey only stated "mainly standing and walking." She puts in the report what the employer indicates, which they indicated Claimant could sit on breaks and at lunch. Otherwise, there is no indication of sitting. The job is about 17 miles from Claimant's home.[183]

As of 16 Nov 05, Helena Laboratories was accepting applications for hand packager positions and anticipated openings in the near future. The position makes an employee responsible for packing diagnostic laboratory equipment and supplies utilized by medical laboratories. It also requires that an employee operate shrink wrap machine to seal boxes. The only qualification requirement is that the potential employee be able to follow directions. Between April 2004 and September 2005, it hired about three to four packers. This was also a full-time position. Claimant could sit frequently throughout the day. The work generally is carried out from a seated position and the individual could stand and walk occasionally. He would have to stand every once in a while, but nothing constant or frequent. He would really only have to stand to make his back feel better. Lifting requirements do not exceed 25 pounds occasionally, but Claimant would be required to frequently use his upper extremities to handle/package products. Potential employees are asked to apply in person and the position pays $7.50 per hour. Helena Labs is between 19 and 23 miles from Claimant's home.[184]

The job at Cracker Barrel was for a full-time position as a busboy. The employer did not indicate a split shift requirement, so she assumes that it was for a single shift. Restaurants tend to have busy periods during lunch and dinner. The busboys wipe down tables and put down silverware usually as soon as the diners leave. Other job tasks include loading dishwashers, washing pots and pans, and putting the utensils, plates and

[182] EX-19, pp. 34-37, 51, 60-62; EX-16, p. 2.
[183] Id.
[184] EX-19, pp. 37-39 51; EX-16, p. 3.

glassware away. There is usually a down period from 2 o'clock until about 4 o'clock. However, in restaurants like the Cracker Barrel there are a lot of travelers who stop in to eat. There is no traditional dining hour like most restaurants, but there is also a lot more traffic coming through. She did not specifically ask Cracker Barrel whether they had traditional dining hours or more of a tourist-type clientele because she is very familiar with the restaurant from working with other individuals who have worked there and from visiting the restaurant on other occasions. She believes it might be slower between 2 o'clock and 4 o'clock, but it would not be empty. Claimant would be required to stand or walk for most of the eight-hour day. He could sit during his breaks, at lunch, and when the restaurant was not busy.[185] Claimant would have things to do throughout the day, but he would have some ability to control his movements because it is not a highly paced production environment. It asks potential employees to apply in person and pays $5.15 per hour to start. Cracker Barrel has a good amount of turnover and between April 2004 and September 2005, it hired at least every one to two months. As of 16 Nov 05 there are openings with Cracker Barrel. Cracker Barrel is also about 19 miles from Claimant's home.[186]

Although the labor market survey did not specify, the job at Luther's Barbecue was for a full-time position as a busboy. She based her conclusion on her experience in working with these types of employers. This restaurant has a certain amount of business throughout the day, however more at lunch and dinner. Her understanding is that the position is for a straight shift, not a split shift. The job requires an employee to clean/wipe down tables, remove dishes, glassware and utensils, and load and unload the dishwasher. Luther's Barbeque is located about 23 miles from Claimant's home and paid $5.15 to start. After a three month evaluation, an employee has the potential to earn $5.50 per hour. It asks potential employees to apply in person and it typically hires someone about once every other month. She did not believe it was cost prohibitive for Claimant to travel 23 miles one-way for a job he earned $5.15 per hour. At some point it does become cost prohibitive, however, it is on a case-by-case basis.[187]

In her experience, when working a full-time job, an employee is never limited to two breaks in the morning and none after lunch. An employer is not going to expect a person to stand continuously during an eight-hour day. It is also her experience that busboys do not work frantically for the entire eight-hour day. They have slow times in their work. Ms. Seyler did not receive any instruction to look for part-time work. Claimant's ability to sit while at work will depend on how much work there is. Based on her opinion, Ms. Seyler is pretty confident that an individual is not expected to stand every single second throughout the day. However for the Cracker Barrel and Luther's Barbeque positions, if the employers stated Claimant could sit when necessary, she would have noted it in her report.[188]

[185] The labor market survey merely stated that Claimant is able to sit while at lunch and on breaks. It does not mention sitting during down time.
[186] EX-19, pp. 39-45; EX-16, p. 4.
[187] EX-19, pp. 45-50.
[188] EX-19, pp. 57-62.

Regarding his job search, Claimant could have done more. Calling potential employers is only one step in getting a job. He should have also gone to the places of business, fill out applications, and follow-up. In her experience, many workers in Claimant's field actually go the shipyard to fill out applications when they look for another job, they do not just call. Ms. Seyler believes it is expected job-seeking-skill behavior to go to the place of business and fill out an application. She could not quantify it with a percentage.[189]

ANALYSIS

Nature and Extent of Disability and Suitable Alternative Employment

Since Claimant has not reached maximum medical improvement, his work-related disability is still temporary in nature. The parties agree that Claimant cannot return to his usual form of employment. Therefore, Claimant is considered totally disabled until such time as Employer establishes suitable alternative employment. The disputed issue in this case is whether Claimant suffered from a total or partial disability from 24 Aug 04 through 24 Apr 05.

Claimant is a 31 year-old man with a sixth grade education. He has worked as a welder, dishwasher, and laborer. He primarily speaks Spanish, but understands some English. He worked as a welder for Employer on several different occasions prior to his work-related back injury on 07 Apr 04.

On 25 Aug 04, Dr. Randall opined that Claimant suffered from a resolved lumbar strain and released Claimant to return to work with a 0% impairment rating. Claimant did not agree with Dr. Randall's assessment because he still had pain and sought medical treatment elsewhere.

Claimant returned for a follow-up appointment with Dr. Randall on 09 Sep 04 with complaints of increased pain in his lower back radiating down to his left leg. Claimant informed Dr. Randall that his pain increased whenever he walked or lifted anything. Nevertheless, physical examination revealed negative straight leg raises, normal reflexes, and full range of motion. Even though Claimant specifically complained of pain radiating down his leg, Dr. Randall diagnosed Claimant with mechanical back pain without signs of radiculopathy.

[189] Id. at 54-56.

An FCE revealed that Claimant qualified for full-time work status and could occasionally lift up to 20 pounds and frequently lift up to 10 pounds. It also revealed that Claimant could sit frequently (34-66%) throughout an eight-hour day (34% = 2.72 hours, 66% = 5.28 hours) and could stand occasionally (1-33% or 0-2.64 hours). These limitations, however, are based on Claimant's demonstrated signs of symptom exaggeration and submaximal effort. Therefore, Dr. Waugh opined that the FCE results should be considered Claimant's minimal abilities.

Claimant returned to Dr. Randall on 08 Oct 04 after completing the FCE. Although the FCE showed invalid results secondary to poor demonstrated effort, Dr. Randall modified his assessment and restricted Claimant to light duty work. Claimant still maintained that he could not work. Dr. Randall opined that Claimant's condition lacked objective findings and that he had done everything he could to rehabilitate Claimant's back.

Claimant began treating with Dr. Gunderson on 17 Sep 04 for lower back pain. Even though his posture, gait, and range of motion were normal, Claimant had tenderness at L5 on both sides and a positive straight leg raise. Claimant's MRI revealed a disc herniation. Dr. Gunderson did not believe Claimant was a surgical candidate at that time and released Claimant to return to work in a modified capacity of light duty.

Dr. Gunderson did not examine Claimant again until 26 Apr 05. At that time, Claimant complained of back pain radiating down his left leg with associated numbness and tingling. Claimant appeared to be limping on his left side and continued to have positive straight leg raises. Dr. Gunderson opined that Claimant could have worked full-time at light duty up until April 2005. Specifically, he found that Claimant could have handled the physical requirements of busboy work. As of April 2005, Claimant could no longer work. A repeat MRI was taken in September 2005 and revealed that Claimant's condition progressively worsened. Claimant became a surgical candidate. Claimant's medical complaints were consistent with what Dr. Gunderson observed on both MRI films. His complaints were just a natural progression of his original injury.

From August 2004 until April 2005, Claimant testified that he had continued back pain radiating down his left leg. The only thing that helped relieve his pain was to lie down or change his position. The pain would get worse when he picked things up, walked, or sat down. Claimant also testified that he could only stand for two hours without causing back pain. After two hours, he has to walk, sit, or lie down.

Dr. Randall's reports appear to be inconsistent with the objective findings and Dr. Gunderson's medical opinion. According to Dr. Gunderson, Claimant could work full-time at light duty from 17 Sep 04 until April 2005. Dr. Randall, on the other hand, initially cleared Claimant for full-duty, but then on 08 Oct 04 he restricted Claimant to light duty. Dr. Gunderson compared Claimant's MRIs and opined that Claimant's

condition progressively worsened between August 2004 and April 2005. He believes Claimant now requires surgical treatment and as of 25 Apr 05, could no longer work at all. Dr. Gunderson's opinion appears to be more consistent with the weight of the record, including Claimant's statement that he could have worked as a busboy during the period. Consequently, the Court finds that Claimant was capable of light duty between 25 Aug 04 and 24 Apr 05 and turns to determine whether Employer established available suitable alternative employment.

Ms. Seyler, the vocational expert, reviewed Claimant's restrictions and noted that Dr. Gunderson believed Claimant could have worked at least up until April 2005, possibly September 2005. She further noted that Dr. Gunderson released Claimant to return to work at light duty. Light duty work suggests that Claimant can lift up to 25 pounds. Ms. Seyler attempted to meet with Claimant before she prepared the Labor Market Survey, but was allegedly not allowed to. Therefore, she had no personal knowledge as to whether Claimant needed to actually sit while working.

Ms. Seyler prepared a labor market survey (LMS). In preparing the LMS, Ms. Seyler assumed that Claimant could not speak any English. She also understood that Claimant did not have any skills and could only perform entry level, unskilled or very low semi-skilled work. All the jobs she considered for the LMS were considered entry-level positions that did not require any preexisting skills. The jobs she identified only required that Claimant show up on time and follow directions. The employers would consider Spanish only speaking applicants and several actually had such employees already working there.

According to Ms. Seyler, light duty work was available for Claimant as of April 2004 up until September 2005. She identified available light duty jobs as a clothes sorter, garment presser, hand packager, and several busboy positions. These jobs were only representative of the labor market, within Claimant's restrictions, as a whole. The job as a clothes sorter would allow Claimant to alternate between sitting, standing, and walking throughout the day and paid $5.15 per hour. The job is located about 15 ½ miles from Claimant's home.

The job as a garment presser would require that Claimant stand for most of the day and lift 25 pounds and bend occasionally. Dr. Randall placed a restriction of no lifting greater than 10 pounds on 09 Jun 04, but then increased the restriction to 25 pounds on 23 Jun 04. Dr. Gunderson never discussed lifting restrictions and merely referenced the FCE for restrictions. The FCE dated 16 Sep 04 reflected that Claimant had a lifting capacity of 20 pounds occasionally and 10 pounds frequently. Therefore the job as a garment presser is not suitable alternative employment.

Even though the hand packager position with Helena Laboratories would allow Claimant to sit for most of the day, it also exceeded Claimant's lifting capabilities, requiring that Claimant lift 25 pounds occasionally with frequent use of his upper extremities to handle/package products. Therefore, this position is not suitable alternative employment either.

Ms. Seyler also identified full-time busboy positions with Cracker Barrel or Luther's Barbecue. A busboy is required to wipe down tables, load dishwashers, wash pots and pans, and put utensils, plates and glassware away. Claimant could sit during his breaks, at lunch, and when the restaurant was not busy. Claimant could earn $5.15 per hour to start. At Luther's Barbecue, after three months, he would have the potential to earn $5.50 per hour. Employment as a busboy would likely require an employee stand or walk for most of an eight-hour day. The employers did not specify whether Claimant would be able to sit when necessary and Ms. Seyler would have noted it in her report had they stated as much. Nevertheless, Dr. Gunderson opined that up until 26 Apr 05, Claimant could have handled the physical requirements of busboy work. In addition, Claimant stated that he believed he could have physically handled the work as a busboy. As such, the busboy positions Ms. Seyler identified in the LMS qualify as suitable alternative employment.

Even though Employer established available suitable alternative employment, if Claimant demonstrates that he tried with reasonable diligence to secure employment and was unsuccessful, Claimant may still be found totally disabled under the Act. Claimant testified that he tried to look for work, but was unsuccessful. He went to Casa Ole to apply for the busboy position, but did not get the job even though he believed he could handle the work requirements. He never asked for an application at Casa Ole, he just asked if it was hiring. He never returned to the places of business nor did he call to see if any positions opened up. Although he understood that if he really wanted to a job he needed to apply in person, Claimant did not go to any other businesses to apply for work in person. Claimant failed to use reasonable diligence to secure employment.

Therefore, Employer established available suitable alternative employment between 25 Aug 04 and 25 Apr 05. The suitable alternative employment identified in the LMS paid $5.15 per hour which correlates to a post-injury weekly wage-earning capacity of $206.

Wages

Claimant earned a total of $6,720.50 in per diem payments during the relevant one-year period prior to Claimant's work-related injury. The record shows that Claimant earned $15.50 per hour when he worked in the shop and $11 per hour when he worked away from the shop. He also earned a per diem when he worked away from the shop; however, the record is not clear on how the per diem was earned. Claimant testified that

he earned an additional $4 per hour per diem away from the shop. Mr. Metreyeon, Employer's general partner, denied that the per diem was paid at an hourly rate and maintained that the per diem was a $46 daily per diem that increased and decreased depending on whether an employee worked more or fewer than 12 hours because it would not be fair if an employee worked 11 or 13 hours and still received the same per diem that a 12 hour worker received. He did not explain what additional costs a 13 hour per worker would incur that a 12 hour worker would not, that would justify an increased per diem. As to the Cameron jobsite where Claimant was injured, employees received $36 per day, plus an extra $10 because of the distance to the jobsite.

Mr. Metreyeon stated that Employer came up with the per diem amount by doing a good faith estimate "many years ago." It had decided to stop providing tools, because employees did not take care of them and Employer was spending too much replacing them. He admitted that the good faith estimate was based on the number of hours an employee worked, but denied that the per diem was paid hourly. Mr. Metreyeon did the estimate himself and reviewed his estimate with an accountant who assured him he complied with the IRS regulations for incidental expenses. His accountant, however, did not know what an "accountable plan" was, which relates specifically to whether money received from an Employer should be includable as wages. He testified that if necessary, the per diem could also cover meals, mileage, tools, clothing, or any other incidental expenses. He could not testify regarding what the incidental expenses were because each job created a different situation. Even though he admitted that each job created a different situation, he also admitted that the per diem pretty much stayed the same. The only difference he could account for was an extra $10 he gave employees because of the increased distance to the Cameron job. He did not account for any other possible expenses. Even though Mr. Metreyeon admitted to giving employees an extra $10 per day for driving out to the Cameron jobsite, he later denied paying for mileage to the Cameron jobsite, stating that it was the workers' choice whether to drive back and forth.

Claimant testified that he still spent the night at home when he worked at the dock. He also stated that he sometimes brought his lunch from home, while other times he was fed by Employer. When he worked offshore, he got to the platforms by a helicopter or boat provided by Employer. He also got to the helicopter or boat by an Employer provided van from the shop. He sometimes stayed on the rig when he worked offshore, otherwise he would return home for the night. There was nowhere to spend money when he worked on the offshore rigs and the platform provided his meals, drinks, and laundry. He did not have to pay for his room when he stayed on the rig.

Although the rig where Claimant injured himself may not have housed or fed workers, Mr. Metreyeon could not testify what the per diem for other locations was based upon or what type of services those locations offered Claimant. Mr. Metreyeon testified that every jobsite was different and that the per diem changed based on difference circumstances. He could not testify about the per diem received at different jobsites.

Mr. Metreyeon first testified that employees were not offered lodging when they worked on the rig, but later stated that when employees work offshore, their rooms are provided. He also later testified that meals, incidental snacks, drinks and laundry were also provided and that the only things employees needed to purchase themselves was their tools, clothing, and incidental expenses such as tobacco products and personal hygiene items. Mr. Metreyeon denied including tobacco products in his good faith estimate. He admitted that his good faith estimate included lodging, food, tools, and clothing. He maintained that he could not testify about what expenses were included in the good faith estimate without pulling the records for a specific job. He did not pull any records to prepare for his deposition.

Mr. Metreyeon had time to prepare for his deposition and review his employee's records. He had more than ample opportunity to review his records and determine what the per diem his employees received was intended to reimburse. The inconsistencies in his testimony and the lack of detail made him a less credible witness.

The record is clear that Claimant did not incur any expenses related to meals, lodging, or laundry when he worked away from the shop. Any part of the per diem that Employer alleges related to such costs is properly considered wages.

To weld, Claimant needed to bring to the jobsite a grinder, whip, leather jacket, gloves, and a welding helmet. He testified that he only spent about $300 per year on welding supplies and used the same tools when he worked at Employer's shop that he did when he worked at the dock. Most of his work for the one-year prior to his accident was performed away from the shop, for which he received a per diem. According to Claimant, working offshore did not cause his tools or clothes to wear out quicker. He admitted that the shop protected him from weather conditions, but denied that the weather affected the condition of his tools. Although he would lose his tools if he dropped anything in the water, Claimant has never lost anything in the water because he either works inside something or over grating. In fact, the jobsite where he injured himself was an onshore location. Claimant's equipment lasts the same whether he works in the shop or elsewhere. His clothes may get very dirty when he works in welding tanks, but Employer washes his clothes before he even gets back on the crew boat or helicopter. He has never thrown away his clothes after working.

Mr. Shupp, a CPA, testified that for employees' tools, safety equipment, supplies, and clothing to be reimbursable without being included as wages, a good faith estimate must be done. The good faith estimate requires a determination of whether the reimbursement is closely approximate to the employee's actual costs. Mr. Metreyeon admitted that the per diem was based on a "ballpark guess." If a company discovers it is reimbursing at a much higher percentage from the actual expenses, then the per diem will still be included as wages.

Even though Employer maintains that part of the per diem covers the expenses employees incur in replacing tools and clothing while working away from the shop, Mr. Metreyeon never provided documentation of such expenses other than his own testimony that he conducted a good faith estimate.

Mr. Metreyeon testified that the Cameron job site where Claimant injured himself was anywhere from an 87 to 114 mile commute. There was also testimony that Claimant drove only 20 miles to another jobsite location. Mr. Metreyeon did not testify as to Claimant's commute to other locations, yet he suggested that Claimant's mileage reimbursement was included in the per diem. Even though Claimant only drove 20 miles for some locations and possible up to 114 miles for others, Mr. Metreyeon testified that Claimant likely earned the same per diem. In addition, Mr. Metreyeon testified that when Claimant worked offshore, he would either be picked up at home or the shop for transportation to the offshore location. Mr. Metreyeon further testified that he did not know whether the per diem amount changed for an employee that drove themselves versus an employee that was picked up by a common carrier.

Mr. Shupp reviewed Claimant's employee file and relevant depositions, determining that the per diem Employer paid its employees should have been includable as wages. According to Mr. Shupp, neither Mr. Metreyeon nor his accountant made any kind of good faith estimate that would justify the per diem Employer paid to its employees.

An argument that since such benefits were not included within employment taxes it cannot be defined as wages under the Act is misplaced. Based on the record in this case, the per diem Employer paid to Claimant was more likely than not a wage rather than a reimbursement for expenses. Mr. Shupp's and Claimant's testimony was more consistent than that of Mr. Metreyeon and accorded more weight.

The language of §902(13) does not limit wages solely to the reasonable value of an advantage that is included for the purposes of any withholding of tax. The phrase "including the reasonable value" is merely a term of expansion, not limitation. Wages include monetary compensation, *as well as* the reasonable value of an advantage.

The record as a whole does not reflect a rational nexus between the per diem and Claimant's expenses for meals, transportation, lodging, or incidental items. Claimant testified that he spent no more than $300 per year on supplies. Mr. Metreyeon's stated that the per diem increased or decreased depending on whether an employee worked other than 12 hours per day. The per diem was based upon the hours worked with all employees receiving the same per hour rate. The per diem payments were unrestricted and required no proof of actual or estimated expenses.

This Court finds that the so-called "per diem" is more accurately characterized as a wage. As in *Wright,*[190] *Story,*[191] and *Roberts*[192] the per diem at issue here was part of the actual money that Claimant received from Employer and is thus includable as wages for determining average weekly wage. It is apparent from Claimant's wage statements that every time he worked offshore he received an additional paycheck for per diem and it is apparent that the per diem was part of Claimant's employment agreement. The per diem is includable under the first clause regardless of whether it is subject to tax withholding.

The per diem Claimant received from Employer was nothing more than a disguised wage that should have been includable as taxable income. The Court will reduce the total amount of the per diem that should be includable as wages by $300 to cover the $300 per year that Claimant admittedly spent on welding supplies. Therefore, the $6,420.50 Claimant received as per diem payments should be includable as income for determining Claimant's average weekly wage.

Average Weekly Wage

The relevant 52 week period for determining average weekly wage is from 07 Apr 03 through 06 Apr 04.[193] Claimant's wages with Employer do not begin until 06 Jun 03. Claimant's earnings from 06 Jun 03 through 06 Apr 04, total $27,856.48.[194] Claimant also earned $6,720.50 in per diem. The Court has determined that the per diem should have been included as wages and therefore adds this amount to Claimant's total wages. The Court reduces the total amount of the per diem by $300 to adjust for the amount Claimant admittedly spends on supplies each year. Therefore, $6,420.50 is includable as wages. Claimant's total relevant income for the one year prior to his 07 Apr 04 injury is $34,276.98. This amount does not include income Claimant received for unemployment.[195]

Claimant earned a total of $34,276.98 in the 33 weeks prior to his work-related injury. The record does not indicate whether Claimant worked five or six days per week. Although the record provides how many hours per pay period Claimant worked, it did not break down the number of days. In addition, there is nothing in the record reflecting the earnings of an employee in the same class as Claimant who has worked for substantially the whole of the year. Since this Court could not fairly apply Section 10(a) in the

[190] *Wright*, 155 F.3d 311.
[191] *Story*, 30 BRBS 225.
[192] *Roberts*, 35 BRBS 65.
[193] Claimant used 01 Jun 03 through 16 Apr 04 as the relevant one-year period prior to Claimant's injury. Employer was not clear on the basis of its calculation, but it appears from its suggested total earnings that it included time after the date of injury. Claimant was injured on 07 Apr 04 and the relevant one-year period ended on 06 Apr 04.
[194] From 03 Apr 04 through 08 Apr 04 Claimant earned $1,272. The only relevant days include 03 Apr 04 through 06 Apr 04. As such, the amount earned for that week was reduced to $763.20 (1,272 ÷ 4/7 = $726.85).
[195] In applying Section 10(c), the Court did not include those days Claimant received unemployment as working days or the unemployment payments as income.

absence of clear evidence of how many days per week Claimant worked, his average weekly wage was determined using 10(c). The Court divided his yearly earnings by the number of weeks Claimant actually worked. Claimant's average weekly wage is $1,038.70. This amount fairly and reasonably represents Claimant's earning capacity at the time of his injury.

Section 14(e) Penalty[196]

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after Employer unilaterally elects to terminate or suspend compensation payments, it must file a notice of controversion within 14 days or be liable for an additional 10% penalty of the unpaid installments. A notice of suspension of payments shall satisfy the requirement if it contains the same information.[197]

In the present matter, Employer began voluntary payments of compensation benefits on 16 Jun 04. Employer continued paying disability benefits through 24 Aug 04 based on an average weekly wage of $678.72, when it discontinued Claimant's benefits because he was released to return to work. Employer did file a Notice of Final Payment or Suspension of Compensation Payments on 24 Aug 04, but did not file a Notice of Controversion of Right to Compensation until 02 Mar 05, after the informal conference's recommendation.

In accordance with Section 14(b), Claimant was owed full compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[198] Although Employer paid Claimant benefits within that time period those benefits were based on what has been ruled to be an incorrectly calculated and reduced average weekly wage. Employer's failure to controvert the difference makes it liable for Section 14(e) penalties from 16 Jun 04 through 24 Aug 04 based upon the difference in Claimant's average weekly wage and the amount Employer used as the average weekly wage.

Employer filed a Notice of Final Payment or Suspension of Compensation Payments on 24 Aug 04 that contained the information required for notice of controversion. As a result, penalties do not apply from 25 Aug 04 and continuing.

ORDER AND DECISION

1. Claimant suffered from a temporary partial disability from 25 Aug 04 through 25 Apr 05.

[196] Claimant cites penalties as a part of his requested relief in this case, but other than what appeared to be a boilerplate inclusion in general language, never mentioned them in his brief.
[197] *White v. Rock Creek Ale. Co.*, 17 BRBS 75 (1985).
[198] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

2. The per diem payments amounting to $6,420.50 are includable as wages.

3. Claimant's average weekly wage at the time of his work-related injury was $1,038.70.

4. Claimant had a post-injury wage earning capacity of $206.00 from 25 Aug 04 through 25 Apr 05.

5. Employer shall pay Claimant temporary total disability benefits based on an average weekly wage of $1,038.70 from 16 Jun 04 through 24 Aug 04.

6. Employer shall pay Claimant temporary partial disability benefits based on an average weekly wage of $1,038.70 and post injury weekly earning capacity of $206.00 from 25 Aug 04 through 25 Apr 05.

7. Employer shall pay Claimant temporary total disability based on an average weekly wage of $1,038.70 from 26 Apr 05 to present and continuing.

8. Employer shall pay all reasonable, appropriate and necessary medical expenses in accordance with Section 7 arising from Claimant's 7 Apr 04 back injury.

9. Employer shall receive credit for all compensation heretofore paid, as and when paid.

10. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[199]

11. Employer shall pay penalties on the difference between Claimant's average weekly wage of $1,038.70 and the amount Employer used as an average weekly wage, $678.72, when it paid temporary total disability benefits from 18 Jun 04 through 24 Aug 04.

12. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

13. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[200]

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199 Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

200 Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller*

A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

v. Prolerized New England Co., 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **19 Apr 05**, the date this matter was referred from the District Director.